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Before the  
**FEDERAL COMMUNICATIONS COMMISSION** RECEIVED

Washington, D.C. 20554

FEB 19 2003

In the Matter of

Improving Public Safety Communications  
in the 800 MHz Band

Consolidating the 900 MHz Industrial/Land  
Transportation and Business Pool Channels

WT Docket No. 02-55

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

Reply Comments of Small Business In Telecommunications To  
Supplemental Comments of The Consensus Parties

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## Summary

The commenting parties have responded to the Supplement filed by the PWC with a vote of “no confidence” and have cited numerous legal and logical flaws throughout the Supplement. Those three sets of comments received in support of the Supplement fail to address any of the serious legal issues raised in previous comments to the PWC Plan and, in fact, create additional concerns about the manner in which the PWC’s proposed rebanding might be funded, if such funding could be performed under any circumstances given the agency’s lack of statutory authority to fund rule making initiative pursuant to private contract.

In sum, the Supplement and the PWC Plan has been rejected by public safety entities, commercial operators, business and industrial licensees, local government agencies, 700 MHz guardband managers, and users of the 1900 MHz band. **All** types of operators from all corners of the industry, large and small, have stated clearly to the Commission that the PWC Plan is unworkable, inequitable, without statutory authority, not in accord with the agency’s codified rules, backed by improperly capped funding which funding is not enforceable, includes improper delegation of the agency’s authority, results in denial of licensees’ due process rights, is overly complex, and unnecessarily vague in its application.

All but three commenting parties requested rejection or material change to the PWC Plan, which material change is deemed unacceptable by the PWC itself. Accordingly, the Commission must reject the PWC Plan.

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Pursuant to that Public Notice entitled *Wireless Telecommunications Bureau Seeks Comment On "Supplemental Comments Of The Consensus Parties" Filed In The 800 MHz Public Safety Interference Proceeding - WT Docker No. 02-55*, DA 03-19 (released January 3, 2003)<sup>2</sup>, Small Business in Telecommunications (SBT) hereby submits its reply comments in further opposition to that document entitled "Supplemental Comments of the Consensus Parties" (Supplement) dated December 24, 2002 filed within this proceeding by those parties referenced therein as the Private Wireless Coalition (PWC).

Introduction

SBT has actively sought a resolution of 800 MHz interference problems which will not unfairly and unnecessary reduce the value of its members' assets, shift an unwarranted burden of relocation onto innocent operators, and will adhere to the tenets of Title 47 among other statutory

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<sup>1</sup> As recognized by the WTB, the parties style themselves the "Consensus Parties" and that the use of the word "consensus" only denotes temporary agreement among the signatories. To avoid confusion, SBT will refer to the group as the PWC.

<sup>2</sup> Including *Order Extending Time for Filing Comments*, DA 03-163 (released January 16, 2003).

limitations. It is this goal which has taken SBT to the forefront in opposing the PWC Plan, including the PWC Plan articulated within its earlier Reply and now via its Supplement. And although SBT, individually, is strongly opposed to the proposals contained within the Suoulement, SBT is more greatly gratified to discover that the parties commenting upon the Suuulement, by a vast, vocal and erudite majority, have also provided a strong opposition to adoption of the PWC Plan. Among the commenting parties, only three have endorsed the PWC Plan “as is.” However, since the language within the Supplement makes it abundantly clear that “as is” is the only method by which the PWC will accept endorsement, the Commission must take the PWC at its word and conclude that the PWC Plan is generally unacceptable to all but the signatories<sup>3</sup>, and may well be unacceptable “as is” to one of the members of the PWC.<sup>4</sup>

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<sup>3</sup> For example, the National League of Cities, National Association of Telecommunications Officers and Advisors, National Association of Counties and United States Conference of Mayors, generally support the efforts of the PWC, however, they further state, “[t]he formation of the Relocation Coordination Committee (RCC) and complementary Phase I and Phase II planning committees is critical to its success. The joint commenters believe, however, that the ultimate oversight must remain within the Commission, and that sufficient safeguards must be put into place to ensure that final authority is safeguarded. NATOA et al. Comments to PWC Suoulement at 4; also, “we are concerned that the estimates on which Nextel proposes its \$850 million fund do not adequately address the costs and expenses of the RCC itself and any arbitration necessitated as a result of the implementation of the Plan.” *Id* at 4. These comments evince serious, material questions and, thus, do not arise to a unqualified acceptance of the PWC Plan.

<sup>4</sup> The conditional acceptance by AMTA, which is troubled by the PWC Plan’s failure to address the value of lost customer revenues arising out of relocations (AMTA Comments to PWC Suuulement at 2), calls into serious question whether AMTA accepts the PWC Plan “as is” as the PWC itself requires. AMTA is not alone in its concern. “Any SMR licensee that is forced to relocateiretune the entire customer base from a particular channel loses its ‘inertia’ advantage respecting those customers. Over one-half of the customer units, and sometimes as many as two-thirds, will churn off the system during such retuning/relocation. This is as reliable an occurrence as the sun rising in the east.” Mobile Relav Associates Comments to PWC Suuulement at 2, fn. 2.

By a vast majority, the commenting parties have rejected the PWC Plan, employing a variety of styles and phrases which amount to a denunciation of both the Supplement and its ultimate beneficiary, Nextel Communications, Inc. (“Nextel”).<sup>5</sup> For examples, Preferred Communications Systems, Inc. states that the supplemented PWC Plan, “remains an unfair solution and inappropriate proposal for attempting to remedy interference to Public Safety.” Preferred Comments to PWC Supplement at 1. ALLTEL Communications, Inc. et al. find that, “even as supplemented, the Nextel plan remains fundamentally flawed and unduly benefits the entity that is causing the vast majority of the interference to public safety – Nextel.” ALLTEL Comments to PWC Comments at 1. And the National Rural Electric Cooperative chimed in by stating “NRECA is more firmly convinced than ever that the Consensus Plan is an imperfect and needlessly complex solution.” NRECA Comments to PWC Supplement at 2. Still others employed greater passion in their opposition, such as Carolina Power and Light Company et al. which claim, “the basis premise of Nextel and the [PWC] has been that critical infrastructure systems should be sacrificed to pave the way for Nextel and others to carve up the 800 MHz band and to secure other valuable spectrum for their own needs” Carolina Comments to PWC Supplement at 1, or the comment that “[t]he Consensus Plan as a whole is incomplete, inconsistent and contradictory, does not address previous concerns or questions raised by others, the border region plan is unworkable, and the technical parameters are unrealistic or undefined.” Palomar Communications Comments at 2; and “Alliant [Energy] views that all versions of the PWC Plan and proposed re-banding to be an extreme, unnecessary and legally complicated

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<sup>5</sup> “The intent of this proceeding was to mitigate interference, not to redefine the playing field to a particular spectrum user’s convenience.” Michigan Department of Information Technology Comments to PWC Supplement at 7.

regulatory effort that will create unnecessary interruption of service and heavy expense.”

Alliant Energy Comments to PWC Supplement at 1.

But beyond these general comments of disfavor with the Supplement, the commenting parties provided to the agency a wealth of perspective and substantive arguments regarding the inadequacy and illegal nature of the PWC Plan. Although the Commission often receives comments to rule making which do little to move the discussion forward or that do not add necessary technical and legal points, the comments to the Supplement were exceptional in their content, setting forth cogent reasons for rejection of the Supplement as a means to resolve the interference problems suffered by Public Safety and other analog operators. Indeed, many of the commenting parties questioned any need for rebanding at all, recommending instead technical solutions and the immediate benefits arising from enforcement of the Commission’s existing rules and policies, augmented with specific guidelines for treating the subject interference. And although many commenting parties recognized the great amount of work which went into the Supplement, the overwhelming consensus among the commenting parties was that the efforts of all of the kings’ horses and all of the PWC’s men did not result in a satisfactory conclusion.

It is beyond doubt that with the exception of merely four sets of comments provided by ARINC, et al.<sup>6</sup>; Nextel Communications, Inc./Nextel Partners, Inc.; Smartlink Communications et. al; and Nevada Wireless, L.L.C., each of the commenting parties sought material changes or

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<sup>6</sup> ARINC et al.’s comments were mainly forwarded to point up a drafting error in earlier SBT comments within this proceeding.

wholesale rejection of the PWC Plan. Since, according to the PWC, any material change in the PWC Plan is tantamount to rejection, SBT concludes that the PWC Plan has been roundly rejected. If the passage of law and regulation were merely a popularity contest, these substantial votes of “no confidence” in the PWC Plan would be sufficient to doom its continued consideration. However, unlike the PWC, which bandies about its use of the word “consensus” to grasp that which it cannot reach with its proposals, SBT recognizes that the Commission must have substantive bases for its decisions, which decisions must reflect the public interest and the agency’s legal mandates. Accordingly, SBT thanks the Commission for this opportunity to point up the continually nagging questions which the PWC has ignored or refuses to address, and which serious questions fully undermine the PWC’s position.

#### Nextel Partners’ Participation

Belatedly and tangentially, Nextel Partners, Inc. (“NPI”) has entered this proceeding via its signature on comments which were obviously prepared by Nextel Communications, Inc., a minority shareholder in NPI. Its participation is one of supporter of the PWC Plan as an incumbent operator. Nowhere within those joint comments will the Commission find that NPI has claimed any different status. It is not offering to contribute to any funds to relocate public safety systems or other affected operations. Instead and in accord with Nextel’s comments, “*All* incumbent licensees required to relocate will be entitled to reimbursement...” Nextel Comments to PWC Supplement at i. There can be no doubt that NPI is an incumbent. Yet, Nextel states further, “the total cost of relocating all incumbent licensees – both public safety incumbents *and* Business and Industrial/Land Transportation (“B/LT”) and high-site SMR (“H-SMR”) incumbents – is expected to be \$828



million.” Nextel Comments to PWC Supplement at 2. As for NPI’s participation in funding, the Nextel Comments to PWC Supplement state only that “[t]his joint filing demonstrates Nextel Partners’ commitment to participate in the system relocations, license swaps and associated actions and procedures involving its 800 MHz licenses necessary to effectuate the Consensus Plan for 800 MHz realignment.” Nextel Comments to PWC Supplement at 3. In effect, Nextel has stated (i) that NPI is an incumbent subject to receipt of reimbursement from the proposed Relocation Fund: and (ii) that the amount pledged for the fund is insufficient to pay for NPI’s costs (note, NPI is not a public safety, B/ILT or H-SMR operator’). By its own admission, therefore, Nextel’s funding of the PWC Plan is woefully underbudgeted. SBT submits that there exists a legitimate and serious question as to whether the \$150 million budget for non-public safety rebanding would be sufficient to compensate NPI alone for its participation.

What is clear is that Nextel is attempting to avoid a commitment to NPI beyond the text of its comments, which read in “weasel words” when it comes to this issue. If there is a reason why Nextel cannot be more forthright, the Commission should not be made to guess what it is. Accordingly, all the Commission is left to find is that NPI is an incumbent and that the funding proposed by Nextel does not take NPI into consideration. Nextel does not explain what kind of rebanding budget busting NPI’s participation will cause, hut the fact that the funding has not been shown to be adequate is apparent.

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<sup>7</sup> Neither is Nevada Wireless, L.L.C., however its comments do not reach the issue of whether it expects reimbursement for its participation in rebanding.

## Border Issues

A number of the commenting parties, including threatened public safety entities, have been quite clear that the PWC Plan is inadequate in the border areas.<sup>8</sup> The commenting parties cite numerous problems with the PWC Plan, not the least of which is that the PWC Plan appears to take a cavalier attitude toward the use of cross-border, mutual aid channels for cooperative response”; provides an insufficient “guard band” between public safety operations and Nextel’s system“;and will not result in a reduction in interference to affected analog systems.” Based on the comments provided, there is little doubt that regardless of the nature of service (public safety, B/ILT or commercial) the affected, commenting licensees in all border areas were unanimous in their rejection of the PWC Plan.”

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<sup>8</sup> Comments to PWC Supplement of Central Maine Power Company; New York State Office of Technology; City and County of San Diego; King County Regional Communications Board; Pinnacle West Capital Corporation; Cascade Two-Way Radio; The Border Area Coalition; Boeing Company; Snohomish County Emergency Radio System; Palomar Communications, Inc.; and Consumers Energy, Inc.

<sup>9</sup> “The relocation of the NPSPAC channels within the US will eliminate the five mutual aid channels we currently share with our Canadian neighbors.” Michigan Department of Information Technology Comments to PWC Suuplement at 5.

<sup>10</sup> For Border Region 5 ( and by implication, Border Region 4), either of the two interpretations we are able to make of the specifics proposed in the Consensus Plan and Supplemental Comments of the Consensus Parties submitted in response to WT Docket 02-55 *are ultimately flawed and should be rejected because of these flaws.*” Snohomish County Emergency Radio Svstem Comments to PWC Supplement at 4, also, Border Coalition Comments to PWC Supplement at 8-10.

<sup>11</sup> “we also feel that the interference mitigation procedures presented within the ‘Consensus Plan’ are incomplete, and too ambiguous.” New York State Office for Technology Comments to PWC Supplement at 10, also, Border Coalition Comments to PWC Supplement at 10-12.

<sup>12</sup> Excepting Nextel and NPI.

In sum, the comments which reflect on border issues note that the PWC Plan simply does not address adequately the concerns of these 800 MHz operators, including the creation of a “double border” problem as described in the Boeing Comments to the Supplement at 10-11. The spectrum shortage in these areas, combined with the problems of OOB and IM interference from interfering CMRS facilities, makes rebanding a nearly unworkable solution for solving those problems in the border regions. The PWC refuses to admit its own contradiction via its advocacy of the necessity of providing a 2 GHz guardband for all other public safety operators, but it does not address the failure to provide equal protection to operators in border regions. To provide such protection, Nextel would need to abandon channels upon which it would rather remain. And that, for the PWC, is a deal breaker.

### Serious Legal Challenges

As stated within its earlier comments within this proceeding, SBT deems the PWC Plan to be without legal support. SBT has clearly articulated that interfering signals created by IM and other OOB energy are and must be treated as unauthorized transmissions, subject to remedial action in accord with 47 U.S.C. §301 and related statutes, rules, policy and precedent.” The PWC Plan fails to address this legitimate issue and, instead, glosses over the issue by claiming that rebanding is a preferable solution to directing interfering CMRS operators to take immediate and substantive steps to avoid and resolve interference problems. Among those comments supporting the PWC Plan

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The treatment of IM and OOB is shared by other commenters, e.g. “The State feels strongly that licensees of the Radio Frequency (RF) spectrum need to confine their emissions to within their assigned channels, to the maximum extent possible. Spilling power outside of their allocations is the RF equivalent of pollution.” New York State Comments to PWS Supplement at 14.

offered in the latest round, none of the commenting parties addressed this issue. In fact, in a statement which evinces its disingenuous nature of avoiding difficult legal issues, Nextel stated, “the Consensus Plan for 800 MHz realignment resolves all of the concerns previously raised by the commenters.” Nextel Comments to PWC Supplement at 2. This bald claim is either false bravado or simply a lack of candor.

Yet, neither the Supplement, Nextel, Smartlink Communications, et. al, nor ARINC et al., respond to a single legal issue raised in earlier comments. One is left with a clear impression that these commenting parties have no answers. They cannot answer clearly why the burden for correcting interference should be shared by non-interfering parties. They cannot point to a single statute which empowers the agency to adopt the PWC’s funding proposal. They cannot explain how the phantom licensee to the proposed 1900 MHz grant will operate, protect collateral, or fund relocation in a manner which provides necessary assurances to persons who would be made to rely on this unarticulated method. They cannot justify the draconian methods for operation of the proposed RCC except to find that procedural protections are, in their view, a necessary expenditure in assuring a speedy rebanding. And on it goes, without answers, reasons, justifications, or even a single law upon which their individual and collective position might rest. Something more is necessary to justify legally the upheaval of the 800 MHz band and the billions of dollars the PWC Plan will cost to thousands of licensees.

One is unavoidably left with the impression that the members of the PWC did not even consider early on whether its Plan was legally possible. And having failed to consider whether the

Commission *could* adopt their Plan, the members pushed forward, adding layers of complexity; committees; time tables; administrators; holding companies; abbreviated procedures; self-appointment to boards and advisory positions; arbitration methods; and endless bar charts, forms, topic outlines, and cost estimates. But all of this “extra credit” work is for naught if the basic assignment is not fulfilled. The basic assignment is to resolve interference to public safety and other operators in a manner which comports with law. Having failed its basic assignment, the remainder is icing on a stale and bitter cake, leaving the Commission with a pretty, but wholly indigestible pile of dough.

For example, the creation of the RCC has been found by numerous commenting parties to be without legal foundation. SBT agrees strongly with those commenters who have stated that the creation of the RCC would violate 47 U.S.C. §155(c)(1) and be an impermissible delegation of the agency’s authority.<sup>14</sup> Further, that the creation of the RCC would violate The Federal Advisory Committee Act<sup>15</sup> since the RCC, as contemplated by the PWC, would make binding policy decisions regarding spectrum exchanges, while lacking adequate staff and resources.<sup>16</sup> These legal objections to the RCC are merely magnified in the creation of the Phase I and II planning committees proposed, whose membership includes only three persons, one of which is to represent Nextel. In the words of one commenter:

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<sup>14</sup> Consumers Energy Comments to PWC Suuolement at 24.

<sup>15</sup> 5 U.S.C. App. 2 §§5(b)(5) and 10(e).

<sup>16</sup> Consumers Energy Comments to PWC Suuulement at 24

In addition to being incredibly complicated, the proposal also suffers from additional procedural, equitable and legal deficiencies. The [PWC members] propose the creation of a Relocation Coordination Committee to “carry out certain frequency coordination, dispute resolution, and licensing application responsibilities during the realignment process.” The Commission and public safety entities are being asked to cede control of all elements of the relocation process to a non-governmental entity. Where has Congress delegated the authority for a third party such as the Relocation Coordination Committee to conduct arbitration on behalf of a Federal agency? The broad duties that would be given to this untested Committee and its multiple subcommittees to perform is a very risky proposition in the context of a transition this complex. (footnote omitted)

CTIA Comments to PWC Supplement at 6. And the above concerns are not exhaustive of the legal issues which might easily arise in the administration of the PWC Plan.” Claims of bias by the RCC are obvious, since one or more of its members would have a pecuniary interest in the outcome of every decision, as would the members of the proposed planning committees. That such claims are likely is obvious.

Insofar as the adoption of the PWC Plan would require the performance of frequency coordination for thousands of applications, frequency coordinating committees serving on the RCC

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<sup>17</sup> The concern regarding Nextel’s direct ability to affect the frequency use of competitors gives rise to anti-trust concerns. Entergy Comments to PWC Supplement at 20

would stand to reap revenue. Nextel's interests are obvious. And as for APCO, another likely member, it may reap coordination fees in addition to its recently obtained \$25 million which Nextel granted to it, *APCO Foundation Receives Grant from PSAP Readiness Fund*, PR Newswire, August 15, 2002. To be sure, SBT does not begrudge any entity from receiving revenues from services performed or for charitable purposes. However, the purse strings manipulated by Nextel are tightly wound about key PWC members and the PWC Plan, giving persons reasons to question the impartiality by which the proposed procedures might be effected.<sup>18</sup> Given the fact that the PWC has provided no method for appeal of its RCC's activities, this concern is wholly justified.

To further exacerbate the problem of bias, the PWC proposes that any arbitration panel will be selected by the RCC and that the arbitration method will be "baseball style" confined solely to costs and timing of relocation." The most salient points regarding relocation are the methods by which the relocation will be accomplished. Once the methods are decided upon, costs might be ascertained and timing considered. It is incredible in the extreme that the PWC does not recognize that there is more to contract negotiations than the price to be paid. The "hurry up and slap a price on it" approach" is wholly inappropriate, particularly in view of the sensitive needs of public safety operations. The PWC provides nothing in the manner of **an** arms-length negotiation or even consideration of the means by which most relocations would be accomplished. This removal by

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<sup>18</sup> "BIILT licensees have no assurances that the RCC will act in the BIILT licensees' best interest." American Electric Power Company Comments to PWC Supplement at 13.

<sup>19</sup> The PWC's "all or nothing" approach to its Supplement mirrors this portion of its proposals. Unfortunately for the PWC members, the Commission must choose nothing.

<sup>20</sup> One is tempted to suggest thirty pieces of silver

committee and panel of a licensee's due process rights is abhorrent.” It reflects poorly on the PWC that it would reduce its constituents' concerns to a numerical cipher.”

SBT hopes that, upon reply to this round of comments, the PWC will finally attempt to address some of the serious legal challenges which the commenters have raised against adoption of the PWC Plan. SBT believes that by the PWC's attempting to answer these concerns, its members might finally come to grips with the reality of their position, that the PWC Plan cannot be adopted as proposed. And, of even greater importance, that it *should* not be adopted as proposed.

#### Addressing the Alleged Benefits Of The PWC Plan

In their comments, Smartlink Communications et al. set forth a list of the benefits which might be brought forth via adoption of the PWC Plan. To SBT's knowledge, this is the first, concise expression of the alleged benefits of the PWC proposal and provides an ample opportunity for substantive reply. Therefore, employing the numerical list appearing at Page 4 of the Smartlink Communications et al. Comments to PWC Supplement, the following response is provided:

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<sup>21</sup> As stated in its earlier comments, the PWC's proposed cancellation of licenses outside of the protections of 47 U.S.C. §303(m) only further illustrates the lack of legal niceties embodied within the PWC Plan.

<sup>22</sup> “Business and Industrial/Land Transportation (“B/ILT”) licensees are not well represented by the PWC” and “The [PWC members] supposedly representing non-public safety wireless interests in this proceeding are either doing so without the input of their membership or their membership has very little interest in the 800 MHz band.” American Electric Power Comments to PWC Supplement at 2.



“given the Commission’s proposal to relocate 800 MHz Business/Industrial/SMR licensees to 900 MHz at the licensee’s own expense,<sup>23</sup> a compromise was reached<sup>24</sup> which provides that:

(1) over seventy percent of 800 MHz Business, Industrial and SMR licensees do not need to move to different frequencies and do not need to make any changes to their systems;”

**Response:** In fact, there exists no justification for any movement, save perhaps Nextel and NSPAC channel operators, and even that is questionable. As for the entities who are located within the PWC’s guardband, these operators are not forced to move by the PWC’s proposed regulation, but possibly by necessity given the reduced level of protection from interference (as defined by the

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<sup>23</sup> The FCC made no such proposal. Nextel did within its White Paper, which proposal was reflected in the NPRM, but not endorsed by the agency. Thus, the stated impetus for the PWC Plan is without foundation.

<sup>24</sup> The statement does not identify the persons who reached this compromise and since the comments are filed by non-members of the PWC, the statement remains a mystery.

<sup>25</sup> The lack of public openness of the “compromise” negotiations has been called into question by a number of commenting parties, e.g. “UTC and EEI question the FCC’s authority to adopt a secretly negotiated contract among a few parties in the 800 MHz proceeding and to impose it on thousands of licensees who have had no part in the agreements underlying it, or to mandate that a private party fund changes required under new rules.” UTC and Edison Electric Institute Comments to PWC Supplement at i; “this backroom deal with the other PWC members [was] without the explicit support of many if not most of their affected members.” American Electric Power Company Comments at 3.

PWC)<sup>26</sup> and concurrent reduction in availability of remedies that each might suffer. If these entities choose to move, rather than receiving secondary treatment via the PWC's new definition of interference, it will be at their own expense.<sup>27</sup>

“(2) the thirty percent of 800 MHz Business, Industrial and SMR licensees [sic] that will be relocated to different frequency maintain their authorizations within the 800 MHz band.”

**Response:** The threat to remove these operations was only lofted by Nextel, which threat could have been successfully challenged without the need to reband all of 800 MHz and pay spectrum tribute to Nextel for the “favor” of allowing legitimately licensed and operated systems to be left undisturbed. The idea that a benefit is created, by maintaining those rights that affected licensees presently enjoy, is stretching the definition of the word “benefit.”

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<sup>26</sup> “The plan calls for sliding interference protection between 859 MHz and 861 MHz, with the threshold increased by 33 dB closest to 861 MHz. UTC members have calculated the differences against their systems, and noted that the average base station will lose 70-75 percent (70-75%) of its usable coverage area, making vital communications systems virtually useless.” UTC/EEI Comments to PWC Supplement at 12. Apparently, if these systems were not “campus” in design, they will become “campus” in reliability following adoption of the PWC Plan. See, also, referring to the guard band “The [PWC] plan does nothing to protect our customers from Nextel interference, and offers no satisfactory remedy for relief.” Peak Relay Comments to PWC Supplement at 5.

<sup>27</sup> Such move would be subject to consent from the RCC. “Should a licensee impacted by greater interference wish to leave the guard band, it may do so only after providing detailed justification and receiving a nod of approval from the RCC – and then may only move to available Business-Industrial/Land Transportation pool channels, and at its own expense.” UTC/EEI Comments to PWC Supplement at 11.

“(3) all 800 MHz licensees moving to different frequencies will have their relocation work fully funded;“

**Response:** This statement is contradicted by the PWC Plan which does not provide for a seamless transition or a host of associated costs to be expended by even nominally protected licensees. The PWC Plan advocates a cheap, quick retune job and nothing more. The PWC Plan does not assure that all necessary funding will be available (except, perhaps, frequency coordination fees to be paid by affected licensees) and the percentage of radios requiring replacement upon which the cost estimates rely is in serious doubt. As fully demonstrated by the latest round of comments, the amount of funding is inadequate and the use of such funding is not intended to provide reimbursement of all costs. Despite the polyanna approach of the PWC and its supporters regarding the offered cost estimates, the likelihood that the amount pledged will be sufficient for all direct costs arising from rebanding is one upon which no licensee, except Nextel, is willing to rely.

“(4) all 800 MHz licensees will enjoy specific, measurable IM interference protection incorporated into the Commission’s Rules;”

**Response:** However, to “enjoy” this protection, systems would need to be substantially upgraded, new receiving equipment purchased, and a number of steps would need to be taken to assure that a system qualifies for the new, measurable IM protection. The New York State Office of Technology estimates that to achieve the status of being worthy of such protection, “this would effectively require a three-fold to five-fold increase in the number of required public safety transmitter locations,

with corresponding fiscal and environmental impacts.” New York State Comments to PWC Supplement at 13. Although SBT supports more definitive rules for assuring compliance with the Commission’s existing policies and precedent regarding interference caused by unauthorized transmissions, operators should not be made to “jump for the carrot” of IM protection via being forced to construct new sites, purchase new equipment, and bear the costs of system upgrades to make their existing systems more impervious to IM or other OOB interference. This proposed requirement places all operators in the position of financing interfering operators’ compliance with rule and law.

“(5) there will be a significant interference reduction versus today’s operating environment.”

**Response:** However, as pointed out by numerous commenting parties, the reduction is mainly to be enjoyed by non-border region public safety entities operating in the lower bands and does little for the proposed “guardband” occupants. Additionally, since there is little or no emphasis of technical resolutions, on a case-by-case basis, backed by better enforcement techniques, the above claimed reduction is meaningless unless compared with other, less disruptive and less costly alternatives. SBT concurs that interference may be reduced to certain licensees via rebanding, but does not find a justification for improving interference protection to one class of operators at the expense of another. The problem with “today’s operating environment” is that interfering CMRS operators are not being placed in the proper position of having to sacrifice their systems’ efficiency (aka business

model) for the purpose of protecting the legitimate rights of other licensees to operate with quiet enjoyment upon authorized channels.

“(6) licensees willing to move to 900 MHz will have the opportunity to double their available spectrum;”

**Response:** This doubling is at a substantial cost to move away from an interference problem not of those licensees’ making.” The level of compensation (if the licensee elects to move within 60 days following the proposed adoption of the PWC plan) is negligible. Additionally, those licensees may double the number of channels upon which they are licensed, but they will not double their spectrum. This faux benefit is without economic justification. It begs the question of why any operator would suffer the obvious churn of relocating its customers to an entirely different band, or re-equipping an entirely integrated B/ILT system, for the purpose of gaining additional channel capacity at enormous costs. In the case of the commercial operator, the churn alone would mitigate any need for additional channels to serve a resultant, reduced customer base. Finally, the difference in system performance is obvious, as among the bands. Although 900 MHz systems are quite suitable for two-way operations, to equate their performance with 800 MHz is not a one-to-one comparison.

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At footnote 16 of those same comments, a question is raised regarding SBT’s reporting of rebanding costs as articulated by other commenting parties. What the footnote fails to focus upon is that the PWC Plan creates an alleged incentive for affected licensees to migrate to 900 MHz. Having created that incentive, supporters of the PWC Plan are not positioned to question the costs to those persons of accepting the PWC’s invitation. What the \$522 million figure shows, under any circumstances, is that the alleged “benefit” to parties arising out of migrating to 900 MHz is economically absurd. “AEP estimates that a move out of 800 MHz would cost [it] in excess of \$60 million.” American Electric Power Company Comments to PWC Supplement at 6.

“(7) 800 MHz licensees will no longer be subject to interference from new “cellularized” systems in the non-cellularized band;”

**Response:** Maybe not, but they will continue to be subject to interference from cellularized systems operating in the newly dubbed cellularized band. And licensees who purchased lower channels at auction with the intent of moving toward cellularized operation would be precluded from employing the band for such purposes, even if those licensees adhere to strict standards to avoid harmful interference. There is no justification provided for this dilution of value of those licenses.”

“(8) there will be additional public safety 800 MHz spectrum.”

**Response:** However, there will be few opportunities for expansion of critical infrastructure systems, B/ILT systems, and SMR systems; while Nextel finally enjoys its contiguous spectrum at 800 and 1900MHz. In effect, Nextel and non-border region public safety operators win the spectrum race, while all other operators suffer. And the cost and risk to individual public safety operators may be too great for each to even participate in the potential benefits of additional spectrum.

Having addressed each of the alleged “benefits” from adoption of the PWC Plan and its questionable initial justification, SBT is left to conclude that an examination of the alleged benefits leaves one with the knowledge that the price of achieving these illusory benefits is too high and far

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<sup>29</sup> “As such, under the Fifth Amendment to the US Constitution, the persons whose licenses are taken must receive full reimbursement, and less valuable spectrum is only partial reimbursement.” MRA Comments to PWC Supplement at 10.

too selectively provided. Given the obvious problems inherent in achieving these alleged benefits, including those cited herein above and those articulated by numerous commenting parties, SBT would suggest that among the joint commenting parties which make up Smartlink Communications, et al., someone may wish to poll the jury with this one question: “If the Commission would order cellularized system operators to remedy interference immediately and at their own expense<sup>30</sup>”, would you prefer that solution to adoption of the PWC Plan?

Despite the strangely articulated basis for the compromise, i.e. the threat of 800MHz systems being moved without compensation to 900 MHz channels, the comments in this proceeding demonstrate clearly that most commenters support technical solutions financed exclusively by interfering operators.<sup>31</sup> Therefore, the issue as to whether interfering CMRS operators should provide a remedy outside of any rebanding is definitely on the table for all but those that walk lock-step behind the trampling business plan of Nextel.<sup>32</sup>

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<sup>30</sup> “[t]he Commission should impose the full costs of resolving interference where they belong – on the parties causing interference – and should not permit this proceeding to be used as a back-door means of relieving interfering parties from their legal obligations.” Access Spectrum Comments to PWC Suuulement at 3. One cost which is consistently mentioned throughout the comments is Nextel’s cost of “elimination of wide-band hybrid type combiners where the technology is known to contribute to interference problems.” Border Area Coalition Comments to PWC Suuulement at 19. SBT agrees that this cost should be immediately borne.

<sup>31</sup> The current record has not established that the interference problem is so pervasive as to require a nationwide retune of the 800 MHz band. City of Baltimore Comments to PWC Suuulement at 2; “It is possible that much of the interference would be eliminated if the Commission enforced its existing rules..” *Id.*

<sup>32</sup> NRECA continues to support the United Telecom Council’s (“UTC”) suggestions for enhanced technical rules and standards, coupled with a case-by-case resolution process as a preferable course of action to mandatory rebanding.” NRECA Comments to PWC Suuulement at 6-7. “The Commission should also require Nextel to make technical modifications to its 800

SBT notes that when the Nextel “White Paper” was published, all segments of the industry looked with derision on the sheer audacity of the contents. Confronted with this challenge to the rights of licensees to remain undisturbed in their use of licensed facilities and seeking to find ways to assist public safety licensees in their ongoing battle against harmful interference, *ad hoc* groups like the PWC were formed. And the entities who were attracted to the PWC, like SBT, included representatives of business, industrial and commercial operators that felt threatened by the possibility of secondary status, rebanding, and uncompensated participation in resolving problems generated by cellularized operations. The participants attracted to the PWC brought together entities which have often disagreed before the agency, united in an effort to protect innocent analog operators. The original comments of the PWC were hurriedly put together and contained a theme, that rebanding was a worst case solution and that any rebanding should be performed only at the cost of interfering operators. Additionally, that Nextel’s demand for 1.9 Ghz was, as stated by one of the authors of those comments in an ensuing press conference, “a non-starter.”” As earlier stated in later comments, SBT agreed in principle with most of the original PWC comments, with a knowledge among all PWC members that substantial work was needed to make the original comments a solid working document which embodied all of the protections needed by adversely affected analog operators.

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MHz operations to provide both immediate and long-term interference relief. Further, the Commission should adopt general technical modifications to its 800 MHz rules to alleviate harmful interference and steadfastly develop and adhere to comprehensive interference mitigation guidelines.” Boeime Comments to PWC Supplement at iii.

<sup>33</sup> “Nextel’s transparent attempt to coerce the grant of a competitive windfall of spectrum in exchange for participating in the resolution of interference *that is principally caused by its own operations* should be rejected.” Access Spectrum Comments to PWC Supplement at 12.



SBT, along with NAMIMRFAC, exited the PWC when the original theme changed from protecting the rights of analog licensees, to one of compromise with Nextel. Suddenly, Nextel's desire to capture the 1.9Ghz spectrum was no longer a "non-starter."<sup>34</sup> By the time the PWC filed its reply, rebanding was no longer a worst case solution, but the preferable course.<sup>35</sup> And now many affected operators' channels would become used as a guardband that affords each less protection than the agency's rules would otherwise entitle each to receive. Reasonable persons may differ regarding whether the PWC Plan, as it is now articulated, is, absent any legal analysis, an appropriate method of resolution of interference to 800 MHz analog operations. However, no person can reasonably state that the contents of the Supplement bear resemblance to the original PWC comments. Smartlink Communications et al.'s assertions to the contrary are disingenuous and the reasons for both SBT's and NAM/MRFAC's<sup>36</sup> withdrawal from the PWC has been well articulated within this proceeding.

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<sup>34</sup> Despite many commenting parties pointing out that grant of such a license to Nextel or its designee is likely violative of 47 U.S.C. §309(j), *see, e.g. Harbor Wireless Comments to PWC Supplement* at 11-12.

<sup>35</sup> "The [PWC] has never been willing to entertain considerations of solutions that do not require rebanding nor to offer critical infrastructure comparable protection to that offered to public safety pool licensees – to such issues the response the Utilities has received is 'we're not here to debate philosophy'." Carolina Comments to PWC Supplement at 7.

<sup>36</sup> Smartlink Communications et al.'s assertion that the PWC Plan is merely "meat on the bones" of the NAMIMRFAC proposal is incorrect, Smartlink Comments to PWC Supplement at 9. The PWC Plan is a mutation of the earlier good faith efforts, tainted by the PWC's inexplicable capitulation to Nextel. It is the "White Paper" in gossamer clothing of the NAMIMRFAC proposal and the original PWC comments.

### Capsizing The PWC Plan

If the Commission needed any additional reason to reject the PWC Plan and the contents of the Supplement, the commenting parties' nearly universal aversion to the cap on funding proposed by the PWC and supported by its questionable cost estimates would be, standing alone, sufficient basis for a summary rejection of the Supplement. The estimations of the commenting parties demonstrates that nearly all have no confidence in either the size<sup>37</sup>, availability or assurances given regarding the fund. "While our concern for insufficient funding has been somewhat relieved, we remain concerned that a 'cap' on the funding may result in an incomplete realignment." State of Florida Comments to PWC Supplement at 1; "public safety users of the spectrum [are left] exposed to probable financial burden by [the PWC's] proposing a reimbursement cap for our costs." City of Philadelphia Comments to PWC Supplement at 1; "the [PWC's] plan's funding mechanism is lacking and does not explain how Public Safety systems will be retuned without interruption." City of Baltimore Comments to PWC Supplement at 2; "Based on the needs of the San Diego jurisdictions alone [the PWC funding] may not be enough." City and County of San Diego Comments to PWC Supplement at ii; "Despite the addition of \$350 million to the original \$500 million proposed for contribution by Nextel, we are not convinced that even the new amount is sufficient to accomplish all the tasks that will draw upon it." Id. at 13; "Nextel should be required to fund the full cost of relocation, with no cap on the amount to be paid to public safety and non-

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<sup>37</sup> "The Supplemental Comments estimate of \$150 million is based in large part upon a questionable assumption that only five percent of B/ILT equipment will have to be replaced in the course of rebanding. Ameren estimates that rebanding would require a replacement of at least ten percent of its radio equipment and expects that many CI entities with older systems will have to replace considerably more equipment." Ameren Comments to PWC Supplement at 5.

public safety licensees.” American Electric Power Company Comments to PWC Supplement at 9; “we are still concerned that the funding is adequate, “ Michigan Department of Information Technology Comments to PWC Supplement at 5; “given that there is broad agreement that the number of radios requiring replacement will likely vary from the current estimates and the fact that even small variations in these numbers will significantly impact the costs of relocation, it is almost certain that Nextel’s pledged funds will be insufficient and the proposed realignment will not be completed.” Verizon Comments to PWC Supplement at 11; “the Supplement’s estimate of the cost of replacing units that cannot be retuned is only one-fifth of the actual cost of replacements.” MRA Comments to PWC Supplement at 14; “For Nextel’s funding proposal to have any merit, its commitment to pay to resolve the interference it created cannot be capped.” ALLTEL Communications et al. Comments to PWC Supplement at 11; and the Comments filed by the Public Safety Coalition which rejects the PWC Plan due to uncertainty in funding.

Thus the gorge which exists dividing interested parties, including most commenting public safety entities, across which the PWC Plan cannot bridge, is the manner of funding. The PWC’s funding source is Nextel which has stated clearly that it cannot and will not agree to fund the rebanding unless the amount which it might be obligated to pay under the proposal is a sum certain,<sup>38</sup> which sum Nextel has set at no more than \$850 million. The vast majority of commenting parties state that any cap is unacceptable. The impasse leaves the Commission in a position of imposing the risk that such funding will run out on thousands of public safety and analog operators, or

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<sup>38</sup> See, Public Safety Improvement Coalition Comments to PWC Supplement at 2 and footnote 3.

rejecting the PWC Plan *en toto* as fully unsupported by the signatories thereto. The Commission's course is clear. The PWC Plan must be rejected.

In truth, this issue is only a sidenote to a much greater issue. The agency lacks the statutory authority to accept the Nextel voluntary pledge as a basis for rule making under any circumstances. However, in an abundance of caution and to provide to the PWC a full response to its Supplement, SBT avers that the capped funding proposal is deemed fully unacceptable by nearly all of the commenting parties.

### Conclusion

Despite its considerable effort, the PWC and its Plan have focused too much on the business agenda of a single member and far, far too little on the rights and obligations of all licensees. Its plan has gone far afield from the requests articulated within the Commission's NPRM and has failed entirely to advocate any immediate and substantive remedies to existing interference to public safety operations or the operations of innocent analog operators. Whether the PWC Plan was borne of hubris or myopia, or merely represents what can happen when entities give up the righteous defense of persons' individual rights in favor of compromise with (or capitulation to) an entity which has shown no consideration for the rights of any, including suffering public safety entities, is unknown. Even its attempt at appeasement to Southern Linc fell short, as that commenter chose to reject those overtures in favor of a more equitable position. That noble act by Southern Linc is not without merit. It reflects Southern Linc's commitment to operate within the technical parameters of its

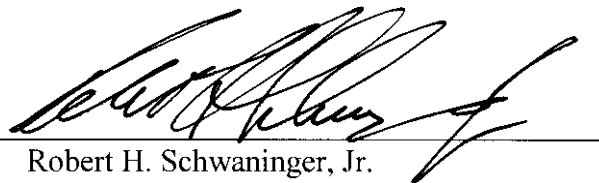
authorizations, accepting the responsibility of its duties as a Commission licensee, even when the PWC offered it specialized treatment.

The time has now come for the Commission to reject the notions of rebanding 800 MHz and do the doable work of issuing a Further Notice of Proposed Rule Making that addresses all of the technical solutions set forth in numerous comments. By focusing on what will fix, in the short term and the long, the problems of interference by imposing upon cellularized system operators the duty to avoid and remedy harmful interference, the Commission will reach the ultimate goals of this proceeding more rapidly and with wholehearted cooperation from nearly all members of the industry. That is what can be done and *should* be done under the agency's statutory mandates, even if it means that Nextel will have to spend its money on compliance rather than contrivance.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By



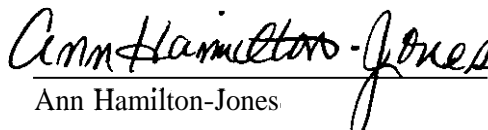
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I, Ann Hamilton-Jones, hereby certify that on this day of February 19, 2003, I caused a copy of the foregoing Petition of Reply Comments of Small Business In Telecommunications to Supplemental Comments of The Consensus Parties to be served by placing a copy in the United States mail, first class, postage prepaid to the following:

  
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